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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 606

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

ATLANTIC COAST LINE R. CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND FOR THE UNITED STATES AS AMICUS CURIAE[1]

OPINIONS BELOW

The opinion of the court of appeals (R. 51–59) is reported at 334 F. 2d 46. The opinion of the district court (R. 28–37) is reported at 213 F. Supp. 199. An earlier order of the district court (R. 26), denying the Commission's motion to dismiss, is not reported. The reports of the Commission (R. 6–17) are reported at 303 I.C.C. 25 and 311 I.C.C. 315.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1964 (R. 60). The petition for a writ of

[1] The United States did not participate in the district court and did not appeal from the decision of the district court to the court of appeals. It joins in this brief as an *amicus curiae*.

certiorari was filed on October 20, 1964, and was granted on January 18, 1965 (R. 61). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a railroad may bring suit against the Interstate Commerce Commission under Section 17(9) of the Interstate Commerce Act and 28 U.S.C. 1336 and 1398 to set aside an order of the Commission awarding reparation to a shipper in lieu of defending an enforcement action brought by the shipper under Section 16(2) of the Act.

STATUTES INVOLVED

Section 1336 of 28 U.S.C. provides:

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Section 1398 of 28 U.S.C. provides:

> Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Section 17(9) of the Interstate Commerce Act, as amended, 49 U.S.C. 17(9), provides as follows:

(9) *Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.*

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or any appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Section 16(2) of the Interstate Commerce Act, as amended, 49 U.S.C. 16(2), provides as follows:

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for

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> damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

STATEMENT

On February 10, 1958, the Commission issued a report finding that the rates charged the Thomson Phosphate Company on several shipments of phosphate rock from Florida to Illinois during a period extending from 1945 to 1950 were unjust and unreasonable and that the shipper was entitled to reparations (R. 6–13). *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 303 I.C.C. 25 (1958). When the respondent railroads refused to certify the shipper's statements showing the shipments it had made during the period under review, the Commission reopened the proceeding for determination of the exact amount of reparations due. Following these additional proceedings, the Commission issued a report on September 28, 1960, finding that Thomson was entitled to reparations from the carriers of $8,889.76, plus interest. *Thomson Phosphate Co.* v *Atlantic Coast Line R. Co.*, 311 IC.C. 315 (1960) (R. 14–17). The Commission entered an order authorizing and directing respond-

ents to pay the sum on or before December 1, 1960.[2]

On September 6, 1961, the affected carriers brought the present suit in the United States District Court for the Middle District of Florida attacking the Commission's order (R. 3). Thereafter, on August 22, 1962 (the carriers having refused to pay the award of reparations (R. 3)), Thomson filed an action in the United States District Court for the Southern District of New York pursuant to Section 16(2) of the Interstate Commerce Act, *supra,* to enforce the Commission's order and collect the award (R. 3, 41–49). Thomson's suit was stayed pending disposition of the litigation initiated by the railroads (R. 3). On May 15, 1962, the Florida district court denied a motion to dismiss filed by the Commission alleging that the carriers' sole remedy was to defend the suit brought by the shipper under Section 16(2). Proceeding to the merits, the Florida district court set aside the Commission's report and order on the ground that the claim made by Thomson was barred by the statute of limitations (R. 29–39). 213 F. Supp. 199. The sole issue raised on appeal was whether the district court had jurisdiction. The court of appeals affirmed, sustaining the jurisdiction of the Florida district court (R. 51). The Commission thereupon petitioned for a writ of certiorari.

SUMMARY OF ARGUMENT

Since 1887, the Interstate Commerce Commission has had the power to issue reparation orders to rail-

[2] This time was later extended until August 28, 1961 (R. 18–19).

roads which have charged unlawful rates. In that year, Congress enacted Section 16 of the Interstate Commerce Act to provide specifically that shippers could sue to enforce such orders. This case involves the question whether a railroad which has been ordered by the Commission to pay reparations can sue to set aside such an order rather than test it by defending against a suit brought by a shipper under Section 16.

I

The courts below held that a railroad could sue to set aside a reparation order of the Commission under Section 17(9) of the Act and 28 U.S.C. 1336, 1398. Those provisions originated in similar form (insofar as relevant here) in the Hepburn Act of 1906, which gave the district courts jurisdiction over suits to set aside Commission orders. While the language of the Hepburn Act makes no distinction between various kinds of Commission orders, we submit that Congress clearly did not intend to include suits involving reparation orders. The words should not be interpreted in a manner inconsistent with the statute's legislative history, purpose, and long-standing construction. See, *e.g., United States* v. *American Trucking Associations,* 310 U.S. 534, 543–544; *Harrison* v. *Northern Trust Co.,* 317 U.S. 476–479.

Here, the legislative history of the Hepburn Act shows that Congress did not propose to grant carriers, for the first time, the right to sue in order to set aside orders awarding reparations to shippers. Congress intended only to make minor changes in the existing

procedures concerning those orders—procedures which already allowed shippers to sue for enforcement. These changes, moreover, were designed to benefit shippers. If, as the lower courts held, railroads may sue to set aside reparation orders, the Hepburn Act, contrary to Congress' design, actually narrowed the rights previously accorded shippers.

Furthermore, the legislative history of the Hepburn Act shows that Congress provided for suits to set aside Commission orders only because, for the first time, it had made certain Commission orders self-executing. *United States* v. *Los Angeles R.R.*, 273 U.S. 299, 309. Rate orders had to be obeyed upon pain of heavy fine without any need for judicial enforcement. Unless railroads were allowed to bring suit to set aside such orders, they could not litigate the validity of the Commission's orders without subjecting themselves to serious penalty. Similarly, unless shippers could bring suit to set aside the refusal of the Commission to issue reparation orders on their behalf, they would have no opportunity for judicial review. See *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 433–434. In contrast, the railroad is fully protected if it is required to wait until enforcement is sought before challenging a grant of reparations. Cf. *United States* v. *Los Angeles R.R., supra.*

The provision in the Hepburn Act has been continued to date. At no time during this lengthy period has Congress indicated—despite several recodifications, amendments, and new provisions based on the

Hepburn Act—that railroads may sue to set aside reparation orders.

II

Not only is there no need for allowing the railroads to sue to set aside the Commission's reparation orders, such a remedy would impair enforcement of the Act. The shipper is already placed by the Act in a less advantageous position with regard to reparation orders. Unlike the situation which prevails in the case of other orders, the railroad incurs no penalties by refusing to obey, and there is no authority in the Commission or the United States to sue for enforcement. Consequently, the shipper can obtain the benefit of the Commission's order only by undertaking the burden of litigation. The only compensating benefits the shipper receives is that in a suit brought by him to enforce a reparation order under Section 16(2) he has the choice of venue and is relieved of court costs and, if successful, attorney's fees. These benefits are lost if the railroad has the option of bringing suit against the Commission to set aside the order. If the shipper intervenes in such a suit, he has neither the choice of forum nor the benefit of the provisions relating to costs and fees. And even if the shipper is successful in that action, the railroad is still not required to obey the Commission's order until the shipper has brought an enforcement action under Section 16(2).

If railroads can bring suits to set aside Commission reparation orders, a heavy added burden will also fall upon the Commission. Most such orders do not involve questions of general importance. This was

doubtless the reason why Congress did not authorize the Commission (as well as shippers) to sue for enforcement and provided that such suits should be heard by one-judge courts. The policy thus adopted by Congress—leaving enforcement of reparation orders to shippers' suits under Section 16(2)—would be defeated if any railroad could simply sue the Commission to set aside the order.

Nor does granting the option to the carrier serve any other policy. As we have seen, the railroad incurs no penalty if it awaits an enforcement action brought by the shipper. Moreover, experience has shown that this approach has not led to a multiplicity of suits.

III

Finally, the construction of the review procedures adopted by the court below is contrary to the assumptions long made by the railroad industry and the courts. Over the long course of years only three previous suits were brought by carriers on the theory that they could initiate proceedings to review reparation orders, and two were unsuccessful. This Court, in considering procedures relating to judicial review of such orders, has taken note of the shipper's remedy under Section 16(2), but has never intimated that any other procedures were available. In short, during the fifty-odd years since passage of the Hepburn Act it has become accepted that the district courts have no jurisdiction to hear a case of this kind.

ARGUMENT

Introduction

The issue in this case is whether a railroad may bring suit in the federal district courts to set aside a reparation order of the Interstate Commerce Commission or, in order to challenge it, must await the suit brought by the shipper to enforce the order. The court of appeals relied on three statutory provisions—Section 17(9) of the Interstate Commerce Act and 28 U.S.C. 1336 and 1398—as conferring jurisdiction on the federal courts over suits brought by railroads to set aside reparations orders. While two of these sections, as we will show below, do not relate to jurisdiction at all, 28 U.S.C. 1336 does confer jurisdiction over "any civil action to * * * set aside * * * any order of the Interstate Commerce Commission."

Section 1336 is broad enough in terms to include actions to set aside reparation orders as well as other Commission orders. However, it is an axiom of the law, repeatedly reaffirmed by this Court, that the general words of a statute should not be applied literally to every instance within them, when to do so would work a result inconsistent with the legislative history, purpose, and long-standing construction. *E.g., United States* v. *American Trucking Associations,* 310 U.S. 534, 543; *Harrison* v. *Northern Trust Co.,* 317 U.S. 476, 479; *Helvering* v. *New York Trust Co.,* 292 U.S. 455, 464–465; *Lynch* v. *Overholser,* 369 U.S. 705, 710; *Holy Trinity Church* v. *United States,* 143 U.S. 457. As stated in the *American Trucking Associations* case, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear

the words may appear on 'superficial examination.'" 310 U.S. at 543–544. That precept, we urge, controls this case.

I

THE HISTORY OF THE STATUTORY REVIEW AND ENFORCEMENT PROCEDURES SHOWS THAT THE EXCLUSIVE METHOD FOR REVIEW OF REPARATION ORDERS IS IN AN ENFORCEMENT PROCEEDING BROUGHT BY THE SHIPPER UNDER SECTION 16(2)

A. THE HEPBURN ACT DID NOT GIVE RAILROADS THE RIGHT TO SUE TO SET ASIDE REPARATION ORDERS

1. The Act of 1887

The original Interstate Commerce Act, 24 Stat. 379, gave the newly created Commission the authority to decide whether the rates of railroad carriers were unreasonable or discriminatory and to award "reparation" to shippers. None of the Commission's orders, however, were self-executing; the orders did not go into effect until an enforcement proceeding was brought, and the railroad was under no penalty if it disobeyed the Commission's determination before that time.

Section 15 of the Act, 24 Stat. 384, authorized the Commission to serve a copy of any report concerning violations of the Act on the offending carrier, "together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done." If the carrier did not comply with the Commission's report the Commission or any interested person could sue in the circuit court under Section 16 to enforce the

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award of reparations. In such suits, the report constituted *prima facie* evidence.

The 1887 Act (as well as the 1889 Act discussed below) did not provide for either the shipper or the railroad to sue to set aside the Commission's order. "For the first nineteen years of the Commission's existence [until the Hepburn Act] no order was * * * reviewable" upon direct appeal. *United States* v. *Los Angeles R.R.*, 273 U.S. 299, 309. The Third Circuit expressly so held as to reparation orders. *Western N.Y. & P. R. Co.* v. *Penn Refining Co.*, 137 Fed. 343, 354 (1905), affirmed 208 U.S. 208.

2. Act of March 2, 1889

While Congress provided in the Act of 1887 for enforcement of Commission orders, this procedure proved inadequate in the case of reparation orders. The Commission stated in its First Annual Report to Congress (p. 27) that it did not have the "general power to award damages in the cases of which it may take cognizance," since the orders could not be enforced. The 1887 Act provided only for enforcement of its orders in courts of equity, and such proceedings in cases involving the payment of money, the Commission concluded, would deprive the parties of their right to trial by jury.

The Act of March 2, 1889, provided for trials by jury whenever the Seventh Amendment required them. 25 Stat. 855, 860–861. Enforcement proceedings, it declared, could be brought by "any company or person interested" in the Commission's order. *Id.* at 861. Thus, Congress, at an early date, explicitly gave shippers the right to bring actions to enforce reparation orders.

The purpose of this provision was explained by its sponsor Senator Cullom (19 Cong. Rec. 5150):

> As it now stands the sixteenth section of the act provides a summary and effective method for the prompt enforcement in an equity court of the administrative orders of the commission correcting unjust discrimination or unlawful preference or extortion and other violations of the statute involving matters of general public interest. As to all such matters the section is already as strong as it can be made, and there can be no question as to the propriety of the procedure prescribed. So far as such matters are concerned the section is left substantially as it stands by the amendment, except that it is limited in its application to that class of cases. The amendment then proposed an addition to the section to provide for the class of cases requiring trial by jury, sending such cases to the circuit court sitting as a court of law, and making provision for a hearing within not more than forty days after the petition is filed.

See also 19 Cong. Rec. 8554.

Soon after the enactment of the amendment, the Commission explained its effect (Fifth Annual Report of I.C.C. to Congress, p. 10 (1891):

> In a number of complaints made in the past year the Commission has been asked to order reparation for damages alleged to have been sustained. Prior to the amendment of March 2, 1889, no provision was made for enforcing in the courts by judgment and execution any recommendation or order for such reparation which the Commission might make. As the law then stood any order of reparation would have been altogether ineffectual, and the Commis-

sion generally declined to consider the question of damages, and confined its recommendations or orders to questions of regulation or matters of an injunctive character, to prevent the continuance of wrong rather than to afford redress for past injuries.

The amendment of March 2, 1889, provided a summary remedy for the recovery of damages in court by the party to whom the Commission might award reparation * * *.

3. Hepburn Act of 1906

The Hepburn Act provided that the Commission, upon finding rates to be unlawful, could prescribe just and reasonable rates for the future. Such orders were made self-executing: "All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days * * * as shall be prescribed in the orders of the Commission." Section 4, 34 Stat. 589. Any carrier which failed to obey an order was subject to a penalty of $5,000 and every day's violation was a separate offense. Section 5, 34 Stat. 591. The same section further provided for enforcement by the Commission or any injured party, if "any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect." Section 5, 34 Stat. 591. In contrast, however, only shippers could sue to enforce reparation orders: "If a carrier does not comply with an order for the payment of money within the time limit in such orders, the complainant, or any person for whose benefit such order was made may file in the circuit court" a suit to enforce the order. Section 5, 34 Stat. 590.

Section 5 of the Hepburn Act also provided that "The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office * * *." 34 Stat. 592. While this provision is phrased in terms of venue, it provided, for the first time, for the direct review of Commission orders. *United States* v. *Los Angeles R.R., supra,* 273 U.S. at 309. This language was interpreted in an early case to cover cases to set aside reparation orders. *Southern Ry. Co.* v. *United States,* 193 Fed. 664 (Commerce Ct.). However, the decision did not consider the Act's legislative history.[2a] As we will now show, that history makes clear, despite the broad language of the statute, that Congress did not intend this provision to apply to reparation orders.

In the hearings on the Hepburn Act, shipper interests urged the Congress, if it should enact new legislation relating to reparations, to preserve the remedies provided shippers under the 1887 and 1889 Acts. S. H. Cowan[3] testified before a House committee for

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[2a] The *Southern Ry.* decision, while directly involving the Mann-Elkins Act (which is discussed below), was based on the court's construction of the Hepburn Act. Since the case was later dismissed on motion of the railroad, it could not be appealed. 4 I.C.C. Acts Ann. 3141.

[3] Mr. Cowan was then engaged in an extensive rate and reparation proceeding before the Commission following lengthy court litigation. See *Interstate Commerce Commission* v. *Chicago, B. & Q. R. Co.*, 186 U.S. 320; Eighteenth Annual Report of I.C.C. to Congress, pp. 62–64 (1904).

the Cattle Raisers Association that (Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 10431, *et al.*, to amend the Interstate-Commerce Law, H. Doc. No. 422, 58th Cong., 3d Sess., p. 291 (1904)):

> In addition to the common law giving a remedy to recover in these cases (I have cited you a case where the Supreme Court has, in a comparatively recent decision, so held) the interstate-commerce act says I am entitled to recover for every damage and injury which may be done to me by any common carrier in violation of the provisions of that act, and that I have a right to go before any court and sue for that and recover it in any circuit court of the United States. What better remedy do you want than that? Why should there be a bond provided which may, perchance, compel a shipper in California to come to Washington for the purpose of prosecuting before the Interstate Commerce Commission a $50 claim? Therefore, so far as the remedy is concerned with respect to recovery back of what is unlawfully paid, *the law now provides the complete remedy for such recovery. And it is foolish to disturb that law.* [Emphasis added.]

Furthermore, the interstate-commerce act provides that the shipper may bring suit in the United States circuit court in the first instance to recover his damages, or he may file his claim before the Interstate Commerce Commission and have them hear the facts and let them say what reparation they shall recommend. And when they recommend reparation and the railroads are not a mind to pay it, then

> he can file suit in the circuit court of the United States and the findings of the Interstate Commerce Commission upon the facts are prima facie evidence thereof.

Instead of merely retaining the former law, Congress actually aided the shipper. The House committee's report on the bill which became the Hepburn Act explained that the "amendment to section 16 of the act of 1887 * * * is intended to aid complainants in whose behalf damages are awarded, on complaint, by the Commission." H. Rep. No. 591, 59th Cong., 1st Sess., p. 5. Congressman Hepburn similarly stated during the debate over the bill (40 Cong. Rec 2256):

> We have modified somewhat that section of the statute that sought to give a wronged shipper the power to be righted through the Commission and through the courts.
>
> Heretofore practically that part of the law has been inoperative. We have now, we think, somewhat smoothed the machinery, so that when damages have been awarded by the Commission the complainant may, by simpler processes in the courts, recover judgment.

Prior to the Hepburn Act, the 1887 and 1889 Acts gave the shipper seeking to enforce reparation orders a choice of venue between the principal place of business of the carrier or the place where the Commission's order was violated and provided for reasonable attorney's fees for the shipper if he prevailed. 25 Stat. 861. The Hepburn Act gave him the opportunity to sue in the district of his own residence, where the carrier has its principal operating office, or through which the carrier runs. Section 5, 34 Stat. 590.

Besides reasonable attorney's fees, if he prevailed, the shipper was also made exempt from costs in the district court and in resisting an appeal. *Ibid.*

If the Hepburn Act were read to grant railroads the option of suing to set aside reparation orders, the result would be to deprive the shipper of these advantages—not only those granted by the Hepburn Act but those in the 1887 and 1889 Acts as well. It is true that since the railroad's suit would be against the Commission, the shipper could avoid all costs by not participating. But if the shipper decided—as persons generally do when their pecuniary interests are directly involved—to participate in the litigation, he would forgo the advantages Congress gave him in enforcement proceedings. Moreover, even if the Commission and the shipper prevailed in the railroad's suit, the railroad still would not be required to pay the reparations since no penalties are incurred if the railroad refuses. The shipper would still have the burden of bringing suit to enforce the Commission's order. Thus, it is clear that allowing suit by railroads to set aside Commission orders would mean that the Hepburn Act, instead of aiding the shipper as Congress proposed, would lessen his procedural rights.[4]

The legislative history of the Hepburn Act also shows that Congress provided for suits to set aside Commission orders only because, for the first time, it was making some orders self-executing. Thus, railroads were required to obey Commission rate orders instanter on pain of heavy penalty. During the debate in the Senate, Senator Clapp, a member of the

[4] See also the discussion below, pp. 31–35.

committee and supporter of the bill, stated that "under existing law the suit brought by the Commission is the first suit brought." 40 Cong. Rec. 5133. In reply, Senator Foraker, another committee member but an opponent of the bill, remarked (*ibid.*):

> It is only because we are now proposing to change the law and to authorize the Commission to make a rate and compel the carrier to put it into operation, unless he submits to a penalty of $5,000 a day for not doing it, that the other provision about applying for an injunction is incorporated in the bill.

As Mr. Justice Brandeis stated in *United States* v. *Los Angeles R.R., supra,* 273 U.S. at 309, "The statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the rate-making power was conferred upon the Commission, and the disobedience of its orders was first made punishable. Hepburn Act, June 29, 1906, c. 3591, § 2–7, 34 Stat. 584, 586–595." In contrast to self-executing orders, there was no need for Congress to provide a new remedy to set aside Commission orders which still had no effect until an enforcement proceeding was brought. As to such an order, railroads could still safely refuse to obey and defend the proceedings which were ultimately brought to enforce them.

Moreover, neither the proponents nor the opponents of the Hepburn Act even intimated that railroads were being accorded authority to seek review of reparation orders. Thus, Senator Chester Long noted: "The bill provides that *its orders, except for the pay-*

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ment of money, shall go into effect (emphasis added) within thirty days *unless the same shall* be suspended, modified, or set aside by the Commission or *be suspended or set aside by a court of competent jurisdiction"* (emphasis in original). 40 Cong. Rec. 4638. In the absence of any indication that an important new right was being given to railroads in reparation cases and the very strong evidence that no such right was intended, it seems clear that the provision ought not be read to authorize carrier suits to set aside reparation orders.

B. THE PRESENT STATUTES ARE SUBSTANTIALLY THE SAME AS THE HEPBURN ACT

1. Mann-Elkins Act of 1910

The Mann-Elkins Act of 1910 created a special tribunal known as the Commerce Court and gave it jurisdiction over all suits brought by the Commission or any injured party to enforce Commission orders "other than for the payment of money." 36 Stat. 539, 555. The Act provided that suits brought by shippers for the enforcement of reparation orders should continue to be brought in the circuit courts under the same rules as to venue and costs as applied under the Hepburn Act. *Id.* at 554.

The Act also provided that "[c]ases brought to enjoin, set aside, annul, or suspend" any Commission order shall be brought in the Commerce Court. This was substantially the same provision as that in the Hepburn Act giving jurisdiction to the circuit courts, except that the latter was phrased in terms of venue. 36 Stat. 539; see also *id.* at 542. The jurisdiction of the Commerce Court was expressly stated to be

exclusive. *Id.* at 540. On the other hand, the Act made clear that it was not intended to give the Commerce Court any more jurisdiction than that previously existing in the circuit courts. *Id.* at 539. Thus, just as a railroad could not sue to set aside a reparation order under the Hepburn Act, the statutory language makes clear that this was equally true as to the Mann-Elkins Act. But see *Southern Ry. Co.* v. *United States, supra.*

Moreover, the legislative history of the Mann-Elkins Act provides additional support for not construing the provision allowing suits to set aside Commission orders to apply to reparation orders. The Act provided that all determinations of the Commerce Court were directly appealable to this Court. 36 Stat. 542. But suits to enforce reparation orders, which had to be brought by shippers in the district court, were subject to ordinary appellate procedures. The expedited appeal for cases in the Commerce Court was designed for orders of national importance, such as railroad rate orders, in order to prevent prolonged litigation. President's Message to Congress, 45 Cong. Rec. 7567–7568. In contrast, enforcement proceedings for reparation orders were deemed "local and isolated questions" not requiring an accelerated appeal. S. Rep. No. 355, 61st Cong., 2d Sess., pp. 1–2; *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 441–442.

Suits to set aside reparation orders, like enforcement proceedings involving the same kind of orders, are equally lacking in national importance. It can hardly be assumed that Congress would provide that one,

but not the other, type of proceeding would be governed by the expedited procedure. Thus, the fact that the determinations by the Commerce Court of suits to set aside Commission orders were directly appealable to this Court, gives considerable support to a conclusion that suits to set aside reparation orders could not be brought.[5]

2. Urgent Deficiencies Act of 1913

The Urgent Deficiencies Act of 1913 abolished the Commerce Court and transferred its jurisdiction to the district courts. 38 Stat. 219. The Act modified the venue of suits to set aside Commission orders and provided that such suits must be heard by three-judge statutory courts. *Id.* at 219, 220. There is no indication in either its language or history that it was intended to expand the power of the courts to set aside Commission orders as conferred in the Hepburn Act.

In *United States* v. *Los Angeles R.R., supra,* 273 U.S. 299, this Court considered the right of the railroads to seek to set aside a valuation order of the Commission under the Urgent Deficiencies Act. The Court held that the district courts lacked this jurisdiction because the order did not itself have any actual effect on the railroad, but merely required further proceedings in which the order would constitute only *prima facie* evidence. *Id.* at 309–311. Similarly, here, the Commission's order is not self-executing—it constitutes only *prima facie* evidence in an

[5] See pp. 23–25 below for the analogous argument under the Urgent Deficiencies Act of 1913.

enforcement proceeding which must be brought by the shipper before the order has any real effect.

Furthermore just as in the case of the Mann-Elkins Act, expedited appeals directly to this Court were provided for in the case of suits to enforce Commission orders, other than involving the payment of money, and in the case of suits to set aside Commission orders. 38 Stat. 220. Again, this was done in order to permit prompt review of Commission orders of broad importance. Hearings before the Subcommittee of the Senate Committee on Appropriations on H.R. 7898, 63d Cong., 1st Sess., pp. 293–299, 300. The fact that Congress did not provide for accelerated review of suits to enforce Commission reparation orders is persuasive that suits to set aside such orders were not regarded as authorized.

In *United States* v. *Griffin,* 303 U.S. 226, 234, a suit was brought to set aside the Commission's refusal to increase railway mail compensation pursuant to the provision of the Urgent Deficiencies Act relating to review of Commission orders. The Court held that the district court did not have jurisdiction. It reasoned that the Urgent Deficiencies Act of 1913 provided for direct appeal to this Court, that this "extraordinary remedy" was designed for matters of "wide public interest," and that no such interest existed concerning the validity of railway mail orders. *Id.* at 234.

Similarly, in *United States* v. *Interstate Commerce Commission, supra,*[6] suit was brought under the Urgent Deficiencies Act of 1913 to set aside a Com-

[6] This case is also discussed below at pp. 36–37, 41.

mission order which denied reparations to the government. While the Court held that there was jurisdiction to hear the case, it also held that only a one-judge court was required. The Court said that, despite the fact that the Urgent Deficiencies Act stated that three-judge courts should hear suits to set aside Commission orders, Congress intended to limit this procedure only to "orders of widespread importance" and that reparation orders did not fall into this category. 337 U.S. at 442. In so holding, the Court was moved by the consideration that the order refusing reparations could never be judicially reviewed unless the injured shipper could bring suit to set it aside. 337 U.S. at 433–435. Moreover, the Court noted that railroads could obtain a judicial determination of the validity of a Commission order requiring the payment of reparations, citing *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U.S. 412, and *Pennsylvania R. Co.* v. *Weber*, 257 U.S. 85, which involved suits by shippers to enforce such orders under Section 16 of the Interstate Commerce Act. 337 U.S. at 435. It concluded that it could not find "a congressional intent to guarantee railroads complete judicial review of adverse reparation orders while denying shippers any judicial review at all." *Ibid.*

The grounds distinguishing *United States* v. *Interstate Commerce Commission* from *Griffin* are completely inapplicable here. As the Court suggested in *United States* v. *Interstate Commerce Commission*, the railroad could obtain a judicial determination of the validity of a reparation order simply by waiting for the shipper to bring suit. Thus, in the instant

case, there is no reason to seek warrant in the statute for a special procedure—review of the Commission's order by a single district judge in the railroad's suit. On the contrary, the problem is resolved by holding that the provision specifically relating to enforcement of reparation awards (Section 16(2)) is exclusive.

3. Transportation Act of 1940

The Transportation Act of 1940, 54 Stat. 899, added Section 17(9) to the Interstate Commerce Act. That subsection provides (49 U.S.C. 17(9)):

> (9) *Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing*
>
> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or any appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

The court of appeals considered this provision "a statutory grant of review" (R. 58). But Section 17 as a whole deals with procedures before the Commission, not with the jurisdiction of the district courts. Thus, subsection (9) simply requires the exhaustion

of administrative remedies prior to seeking judicial review. It specifically states that suit may be "brought in a court of the United States under those provisions of law *applicable* in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission * * *" (emphasis supplied). On its face, it made no change in the existing law relating to the institution of judicial proceedings. *Malone Freight Lines, Inc.* v. *United States,* 204 F. Supp. 745, 750 (N.D. Ala.).

This view of Section 17(9) is supported by its history. Both conference reports state (H. Rep. No. 2016, 76th Cong., 3d Sess., p. 67; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 72):

> A new paragraph (9) is included providing that orders of a division, an individual Commissioner, or a board shall be subject to judicial review as in the case of full Commission orders, after an application for rehearing has been made and acted upon.

Soon after passage of the 1940 Act, the Commission likewise interpreted subsection (9) simply as requiring exhaustion of administrative remedies (55th Annual Report of I.C.C. to Congress, p. 24 (1941)):

> Paragraph (9), by the last three words thereof, "but not otherwise," forces a party who is dissatisfied with a decision to pursue all of the remedies for rehearing or reconsideration before going into court. This inevitably increases the burden at the top of the agency. The former rule was that it was a matter of judicial discretion whether the aggrieved party should be required to exhaust all administra-

tive remedies before going into court against an order of the Commission. *United States* v. *Abilene & S. Ry. Co.*, 265 U.S. 274.

Thus, the Transportation Act of 1940 did not confer on the railroads any rights it did not have before. Just as the railroads could not sue to set aside reparation orders before 1940, they could not do so thereafter.

4. Proposed legislation in 1947

In 1947, Congress considered a bill which reflected its view concerning the power of the courts to hear suits seeking to set aside reparation orders. The Senate Committee on Interstate and Foreign Commerce reported a bill in the 80th Congress to provide for the judicial review of rail reorganization plans approved by the Commission. The bill would have made such plans "subject to judicial review in the same manner and to the same extent as is provided by any statute or statutes of the United States for judicial review of an order of the Commission other than an order for the payment of money." S. 249, 80th Cong., 1st Sess., Sec. 6, p. 42. The Committee explained: "Reorganization plans approved under section 1 are subject to judicial review in the same manner as any order of the Commission other than an order for the payment of money." S. Rep. No. 432, 80th Cong., 1st Sess., p. 13.

While the bill was not further acted on, it does indicate the assumption of Congress in 1947 concerning the issues in this case. If the railroads are correct in their present claim that they may bring an action to set aside reparation orders, there is no difference between the direct judicial review of reparation orders

and all other orders of the Commission. This is obviously inconsistent with the bill and the committee report, both of which assumed that review of reparation orders is different from review of other orders.

5. The 1948 recodification

The court of appeals relied heavily on two provisions—Sections 1336 and 1398—of the Judicial Code as recodified in 1948 (R. 56–59). Section 1336 provides that "[e]xcept as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission." This is substantially the same wording as used in the Hepburn Act and its successors, except that a single sentence covers actions to enforce, as well as to set aside, Commission orders. The Reviser's Notes show that it traces directly back to the reenactment of the jurisdictional provisions of the Mann-Elkins Act in the Judicial Code of 1911, 36 Stat. 1148, and the Urgent Deficiencies Act of 1913, 38 Stat. 219.

Section 1398 of the Judicial Code, in language similar to that of Section 1336, provides that "[e]xcept as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action." This section on its face provides for venue; the jurisdiction of the federal courts over Commission orders is stated in Section 1336,

But even if this Section did implicitly confer jurisdiction, its language, like that of Section 1398, is substantially the same as in the Hepburn Act and its successors. The Reviser's Note shows that the Section is based on the venue provision of the Urgent Deficiencies Act of 1913, 38 Stat. 219, which has substantially similar language as to civil actions which may be brought.

The Reviser's Note to Section 1398 states that:

> The revised section substitutes the words "Except as otherwise provided by law" for the words of the conference bill, "in the act entitled 'An Act to Regulate Commerce, approved February 4, 1887, as amended' ". (See section 16 of Title 49, U.S.C. 1940 ed., which provides for jurisdiction and venue of actions to enforce Interstate Commerce Commission orders for the payment of money.)

It seems apparent from this comment that the revisers intended no change in the unique provisions for review embraced by Section 16(2)—provisions which, we submit, are exclusive.

In sum, the legislative history of Section 17(9) of the Interstate Commerce Act and 28 U.S.C. 1336 and 1398 shows that those provisions do not grant to railroads the right to enjoin reparation orders. While Section 1336—which is the only one of the three Sections even dealing with the issue of jurisdiction—states that "the district courts shall have jurisdiction of any civil action to * * * set aside * * * any order of the Interstate Commerce Commission," Congress never intended this provision to cover reparation

orders. This language, in just as broad a form, was enacted in the Hepburn Act of 1906. The history of that Act shows that Congress intended to have the new provision cover only self-executing orders and that, with regard to reparation orders, the only changes contemplated were to help shippers. Since the Hepburn Act, Congress has readopted substantially the same language without giving any indication that it intended to broaden the rights of carriers. Thus, railroads have no greater right to challenge reparation orders today than they have had at any time in the past half century. They must await a suit to enforce the order brought by the shipper under Section 16(2); in defense, they may seek to show that the Commission's order was invalid.

II

THE POLICIES UNDERLYING THE INTERSTATE COMMERCE ACT STRONGLY SUPPORT THE CONCLUSION THAT THE EXCLUSIVE METHOD FOR REVIEW OF REPARATION ORDERS IS IN AN ENFORCEMENT PROCEEDING BROUGHT BY THE SHIPPER UNDER SECTION 16(2)

In the preceding section, we have argued that the legislative history of the Hepburn Act and its successors shows that Congress intended to assure shippers certain prerogatives in enforcing Commission orders. Here, we contend that the conclusion which we urge will serve the policies of the Act and that there are no countervailing considerations to support the carrier's contention.

A. IF THE RAILROADS COULD SUE TO SET ASIDE REPARATION ORDERS, SHIPPERS WOULD BE PLACED AT A SERIOUS DISADVANTAGE

The basic purpose of the Interstate Commerce Act is to protect shippers from unfair practices on the part of carriers. Indeed, both the original 1887 Act and the early amendments to it were exclusively concerned with such railroad practices. Thus, it would be at odds with the Act's objectives to interpret the Hepburn Act of 1906 and its successors as giving a significant advantage to the railroads over shippers in litigation under the Act. *United States* v. *Interstate Commerce Commission, supra,* 337 U.S. at 435. This is particularly true as to litigation involving reparation orders—cases in which the Commission has already determined that the railroad has violated the Act and is liable to the shipper.

Commission orders not involving the payment of money, as earlier emphasized, are self-executing. The railroad is required to obey on pain of a penalty of $5,000 for each day's violation. 49 U.S.C. 16(8). Consequently, the burden is on the railroad to obey the order, unless it brings suit under 28 U.S.C. 1336 to set aside the order. Such a suit is against the Commission, which then has the burden and expense of defending its own order. The shipper has the *option* of deciding whether to intervene to support the order. Moreover, if the railroad does not sue to set the order aside and yet does not obey it, the Commission and the United States, as well as any injured party, may sue to enforce the order. 49 U.S.C. 16(12). Thus, again, the shipper has the *option* of having the Commission enforce its own order.

The positions of the private parties are quite different in the case of a reparation order. The order is not self-executing and the railroad can ignore it until a court orders its enforcement. Only the shipper—not the Commission—can sue to enforce it. 49 U.S.C. 16(2). The only compensating benefits the shipper receives under Section 16(2) are (1) a broad choice of venue—including, most importantly, the shipper's residence; (2) relief from court costs in the district court and (except on his own appeal) in subsequent proceedings; and (3) payment of his attorney's fees if he ultimately prevails.

If the railroad can bring suit against the Commission to set aside a reparation order, it has the option of determining whether to allow the shipper to have the advantages given him by Section 16(2). For the railroad can sue to enjoin the Commission's order before the date for compliance has arrived—*i.e., before* the shipper can bring an action under Section 16(2) to enforce the order. If the railroad decides to sue, the shipper does not have a choice of venue. Since venue in a suit to set aside a Commission order is "the residence or principal office of any of the parties bringing such action" (28 U.S.C. 1398), the railroad may sue in the district of its principal office, which may be geographically remote (as in the present case)[7] from the shipper's chosen forum. Not only does the shipper lose the choice of forum; if he decides to intervene in the suit brought by the railroad against the Commission (the suit is not against

[7] The carriers' present suit was filed in Florida (R. 20); the shipper filed suit in New York to enforce the order (R. 41–49).

the shipper) in a distant forum, his litigation costs may be greatly increased.

Moreover, the shipper will also lose the advantage given by Section 16(2) in respect to attorney's fees. It seems established that such benefits are granted only pursuant to some statutory right. *Atlantic Coast Line R. Co.* v. *Riverside Mills,* 219 U.S. 186, 207–208. Section 2323 of the Judicial Code, under which the shipper would intervene, confers no such right and we know of no alternative source of authority which would apply.[8]

This Court has commented on the importance of the provision in Section 16(2) relating to attorney's fees and court costs. In *Baldwin* v. *Scott County Milling Co.,* 307 U.S. 478, 482–483, it was stated:

> By thus laying on the carriers the burden of bringing forward evidence to overcome presumptions created against them, and by compelling them, if defeated, to pay plaintiffs' attorneys' fees in addition to the interest allowed by law, the Act unmistakably evidences purpose directly to prevent interposition of pleas lacking merit and so coercively to bring about prompt payment of the commission's awards. In *Meeker & Co.* v. *Lehigh Valley R. Co.,* 236

[8] Fees may sometimes be given by the courts to attorneys out of awards for damages or from funds created through their efforts. However, if this procedure were followed here, it would reduce the shipper's recovery below the amount to which he would be entitled under Section 16(2). Moreover, no fund or damage award would result from the injunction proceeding, since a suit under Section 16(2) would still be required by the shipper, subsequent to the carrier's injunction suit, before he could collect his money.

> U.S. 412, this Court, upholding the clause as to attorneys' fees, said (p. 433): "The provision is leveled against common carriers engaged in interstate commerce, a *quasi* public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the Act to Regulate Commerce * * *. One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the payment, without suit, of just demands does not militate against its validity. And in *St. Louis & S.F. R. Co.* v. *Spiller,* 275 U.S. 156, referring to the same provision, we said (p. 159): "The purpose of Congress in making the provision concerning costs was to discourage harassing resistance by a carrier to a reparation order."

If the shipper intervenes and is unsuccessful in a suit brought by the railroad, he would be precluded by principles of *res judicata* from suing to enforce the Commission's order. On the other hand, if the Commission alone, or the Commission and shipper together, prevail in the suit brought by the railroad, still, as the court of appeals recognized (R. 59), the railroad need not obey the order. No penalties accrue until the order is *enforced* by a court. To be sure, in some instances, the enforcement suit will be readily decided under principles of *res judicata.* However, often the railroad's suit to set aside a reparation order may involve issues common to several shippers benefitting from the order. The individual shipper will still have to litigate any issues peculiar to it in the suit under Section 16(2).

Thus, if the railroads are correct in this case, they are given far greater advantages than the shipper,

even though the Commission has decided that the shipper is entitled to reparations. The railroad can, depending upon its own strategy, sue the Commission in which event the shipper has the financial burden of intervening if he wishes to defend the order in his favor. Moreover, he still has the burden of enforcing the order even if the order is upheld in the suit brought by the railroad. Such procedures give to the railroad the opportunity to place a financial burden on the shipper and to delay significantly the time of the ultimate payment. This may require many shippers to settle litigation by accepting considerably less than the amount awarded by the Commission. There is every indication that Congress had no purpose to place the shipper at such a disadvantage as against the carrier.

B. IF THE RAILROADS MAY SUE TO SET ASIDE REPARATION ORDERS, THE COMMISSION WILL BE OBLIGED TO LITIGATE NUMEROUS CASES INVOLVING RELATIVELY MINOR ISSUES

Congress provided in the original Act of 1887 that either the Commission or any interested party could sue to enforce the Commission's orders. 24 Stat. 384. However, as we have seen (pp. 12–13), this provision was not applied to reparation orders because it did not authorize jury trials. When Congress, in 1889, remedied this deficiency, it pointedly allowed enforcement proceedings in reparation cases to be brought only by "any company or person interested"—not by the Commission itself. 25 Stat. 861. This distinction was retained in the Hepburn Act of 1906 which expressly allowed the Commission or any

injured party to sue to enforce "any order of the Commission, other than for the payment of money." 34 Stat. 591. Only the injured party could sue to enforce a reparation order. *Id.* at 590. And this express distinction still exists in the present law. 49 U.S.C. 16 (2), (12).

Congress has made shippers, not the Commission, responsible for the enforcement of reparation orders. Many of these cases involve minor issues limited to particular shippers which would be more appropriately litigated by the shippers themselves. Thus, the distinction made by Congress was doubtless based on a judgment that reparation orders did not usually involve issues of broad importance. It was also for this reason, as noted above (p. 23), that Congress has provided, and this Court has determined, that cases involving reparation orders do not come within the procedures for accelerated appeal from the district courts to this Court.

There has been no instance in recent years in which the Commission has intervened in any reparation suit. However, the railroads' contention here would draw the Commission into innumerable reparation proceedings in the courts—again, we submit, a result directly contrary to the policy expressed by Congress.

C. SUITS BY RAILROADS TO SET ASIDE REPARATION ORDERS CANNOT BE JUSTIFIED ON OTHER POLICY GROUNDS

1. *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, this Court held that suits to set aside Commission orders denying reparations to shippers were within the general statutory provisions authorizing suits to set aside Commission orders. Accord, *Arkansas Fertilizer Co.* v. *United States*, 193

Fed. 667, 669 (Commerce Ct.). But this Court's holding was premised on the ground that no other mode of judicial review existed and that, if no remedy were implied, shippers would be unjustifiably disadvantaged in comparison to railroads which could obtain a judicial determination of the validity of Commission orders granting reparations (see pp. 23–24 above). Here, the opposite is true. Railroads are not penalized if they refuse to obey the Commission's reparation orders; they need not obey until a court has held, upon suit by the shipper, that the order should be enforced. Such a suit must be brought within one year of the date of the order. 49 U.S.C. 16(3)(f).

Moreover, the standard for review of the Commission's order would be the same whether the railroad sued to set it aside or the shipper sued to enforce it. In actions to set aside orders not involving reparations, the Commission's findings are "made by law *prima facie* true" and "courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541, 547–548; *Western Chem. Co.* v. *United States*, 271 U.S. 268, 271. Precisely the same scope of review applies under Section 16(2). See *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 430; *New Process Gear Corp.* v. *New York Central R. Co.*, 250 F. 2d 569, 572 (C.A. 2), certiorari denied, 356 U.S. 959. Consequently, the railroad can already obtain full judicial review of the order before being required to obey it; no need exists to fashion another method.

Citing *Pennsylvania R. Co.* v. *United States,* 363 U.S. 202 (R. 57), the court below nonetheless concluded that symmetry requires allowing the railroad to sue to set aside reparation orders. In the *Pennsylvania R. Co.* case, the railroad sued in the Court of Claims to recover payments which it contended were owed by a shipper (the United States). A reference was then made to the Commission to determine whether the rates were reasonable, and the Commission determined that they were not. This Court held, after noting that the Commission's order could not be reviewed in the Court of Claims (see *United States* v. *Jones,* 336 U.S. 641), that that court should stay proceedings to allow the railroad to sue in the district court to have the Commission's order set aside.

That decision is inapposite here. In the first place, if the railroad had not been allowed to sue to set aside the order in the district court, the railroad would have been denied all opportunity for judicial review of the order. See 363 U.S. at 204. Secondly, since the Commission in that case, although it decided the reasonableness of the rate, did not issue a reparation order, there was no occasion to consider the statutory and policy arguments set forth above. Thirdly, it is significant that Congress, with the endorsement of the Judicial Conference, has changed the venue and jurisdiction provisions involved in *Pennsylvania R. Co.* to allow the referring court to review the Commission's order so that the losing party need no longer start a separate suit to set aside the order. 78 Stat. 695.

2. The court of appeals also suggested that, unless the railroad can sue to set aside the Commission's

reparation order, it might be subjected to a multiplicity of suits brought by shippers in different courts (R. 56). It is true that shippers for whose benefit reparation orders are made, and all other shippers similarly situated, may sue on the orders under Section 16(2). See *Mitchell Coal Co.* v. *Penna. R.R. Co.*, 230 U.S. 247, 257; *Phillips* v. *Grand Trunk Ry.*, 236 U.S. 662, 665–666. However, a multiplicity of suits might also result if several railroads were ordered to pay reparations to a single shipper and each were allowed to bring suit to set aside the order, whereas only one suit to enforce the order could be brought. And each time a railroad sues to set aside a reparation order and loses, an additional action must still be brought by the shipper to enforce the order. Thus, considered abstractly, it is not clear whether permitting railroads to attack reparation orders would decrease or increase the amount of litigation.

Far more persuasive than any theoretical analysis is the seventy-odd years of practical experience since shippers were first allowed to bring suits to enforce reparation orders. During that time, as we show below (pp. 40–43), it has generally been assumed that railroads could not sue to set aside such orders and few such suits have been brought. Suits to enforce have provided the mode of review. And there is no evidence that different shippers have brought numerous suits in different courts to enforce the same reparation orders. Thus, the fears expressed by the railroads have not been borne out.[9]

[9] In addition, we note that multiple suits are not necessarily an evil when the issues in the various suits are not identical.

III

THE UNDERSTANDING OF THE RAILROAD INDUSTRY AND OF THE FEDERAL COURTS SUPPORTS THE CONCLUSION THAT THE EXCLUSIVE METHOD FOR REVIEW OF REPARATION ORDERS IS IN AN ENFORCEMENT PROCEEDING

It is of course familiar doctrine that the long-standing interpretation of an administrative agency is of considerable importance in interpreting a Congressional enactment. *E.g., Maintenance of Way Employes* v. *United States,* 366 U.S. 169, 179; *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315. The understanding of the industry affected by the statute is likewise of weight.

Here, is it plain that the railroad industry has almost universally assumed, since the Commission's reparation orders first became enforcible in 1889, that railroads could not bring suit to set aside such orders but must await an enforcement action brought by the shipper. Until very recently,[10] it appears that only three cases were brought by railroads to enjoin reparation orders. In two instances, the federal courts refused to entertain the suit on the ground that an

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The present suits, for example, turned on the district court's ruling on the statute of limitations without regard to the justness and reasonableness of the rates charged (R. 35–37). Other shippers might not be subject to a defense of that kind. See also *Pittsburgh & W.V. Ry. Co.* v. *United States,* 6 F. 2d 646, 648–649 (W.D. Pa., 1924).

[10] Four cases are now pending in the district courts. *Central Vermont Railway, Inc., et al.* v. *U.S. and ICC,* Civ. 4010, D. Vt.; *Atlantic Coast Line R. Co., et al.* v. *U.S. and I.C.C.,* Civ. 63–145–Civ–J, M.D., Fla.; *B. & O. R. Co., et al.* v. *U.S. and I.C.C.,* Civ. 15279, D. Md.; *B. & O. R. Co., et al.* v. *U.S. and I.C.C.,* Civ. 14897, D. Md.

later voluntarily dismissed its action. Southern Ry. C
United States, 193 Fed. 664 (1911); 4 I.C.C. Acts Ann. 3141.

action cannot be brought to set aside a reparation order. *Baltimore & O. R. Co.* v. *United States,* 12 F. Supp. 261, 263 (D. Del.) (1935), affirmed, 87 F. 2d 605, 606 (C.A. 3); *Pittsburgh & W.V. Ry. Co.* v. *United States,* 6 F. 2d 646, 648–649 (W.D. Pa.) (1924).

Moreover, both this Court and the Court of Appeals for the District of Columbia have assumed that Section 16(2) is the sole method for review of reparation orders. In *United States* v. *Interstate Commerce Commission, supra,* 337 U.S. 426, the Court, in discussing review of reparation orders, twice suggested that such review may occur only in enforcement proceedings brought by the shipper under Section 16(2). At one point, the Court cited two cases brought under Section 16(2) for the statement that "a Commission award favorable to a shipper is not final or binding upon the railroad." 337 U.S. at 435. Later, the Court noted that had "the Commission made an award to the Government it could have filed a civil suit to recover money damages under the provisions of 49 U.S.C. § 16(2)." *Id.* at 443. The dissenting Justices concluded that Section 16 is the sole basis of review for reparation orders and that the provision for suits to set aside Commission orders did not apply to orders denying reparations. *Id.* at 457.

Again, in *H. K. Porter Co.* v. *Central Vermont Ry., Inc.,* 366 U.S. 272, the Commission had found rail rates to be unjust and unreasonable, but had not ordered reparations. The Court stated that "[s]uch an order, when and if made, can be challenged before a single judge under 49 U.S.C. § 16(2)." *Id.* at 274, note 6.

In *Washington Terminal Co.* v. *Boswell,* 319 U.S. 732, this Court affirmed by an equally divided vote a decision of the Court of Appeals for the District of Columbia Circuit under provisions of the Railway Labor Act which are closely analogous to Section 16(2). Under Section 3 First (p) of the Railway Labor Act, 45 U.S.C. 153 First (p), an employee who has obtained an award of the National Railroad Adjustment Board may file suit in the district court for enforcement if the carrier does not comply with the Board's order. The court of appeals, in an opinion by Judge (later Justice) Rutledge, held that a carrier may not maintain a suit for a declaratory judgment of rights under the Railway Labor Act. 124 F. 2d 235. In words equally applicable here, he noted the "definite and special scheme" for determining the legality of an award and the "detailed plan for review" in an enforcement proceeding, both of which indicated "that the method of review provided was intended to be exclusive. If Congress had intended the Declaratory Judgments Act to be generally available to the parties, * * * there could have been no substantial reason for including in the Railway Labor Act the complex and detailed provisions for the enforcement suit * * *. More especially there could have been no such reason for writing into the statute the unusual and highly important special advantages given to the employee seeking enforcement." 124 F. 2d at 240. As Judge Rutledge further declared, "Congress had no purpose to give the statutory advantages to the employee if he should beat his employer to the courthouse, but to take them away if he should come in second. That is true whether the

employer's suit is one to restrain enforcement of the award, set it aside, declare it void, or reinterpret the original contract with the same effects upon the award." *Id.* at 242. The court expressly cited Section 16(2) of the Interstate Commerce Act as an example of a similar enforcement provision. *Id.* at 249–250.[11]

We submit that the understanding and practice which have long prevailed ought not be disturbed.

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[11] The Court of Appeals for the District of Columbia Circuit has held that a carrier can sue to set aside a reparation order of the Federal Maritime Commission. *Flota Mercante Grancolombiana* v. *Federal Maritime Commission*, 302 F. 2d 887, 894. However, the Court relied on the particular history of the Hobbs Act. It said that, in absence of this history, a "strong argument can be made that only one review should be permitted" and that this should be under a provision which is analogous to Section 16(2) of the Interstate Commerce Act. *Ibid.* The court also relied upon the fact that it was also the proper forum under the Hobbs Act for the shipper to sue to enforce the reparation order, so that the carrier's suit was in the nature of a counterclaim. *Id.* at 893.

CONCLUSION

The judgment below should be reversed and the cause remanded to the district court with instructions to dismiss the complaint.

Respectfully submitted.

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